based on the July letter, and that the dead-line imposed by the defendants in the letter dated August 12, which merely gave the plaintiff merely eight days' notice to vacate, was arbitrarily and unilaterally imposed.

When the defendants agreed to pay $6,000 in July 1974, it could reasonably be inferred that they knew that the money was to be utilized by the plaintiff for the purpose of compensating the plaintiff and his sub-tenants. In fact, in the letter dated July 25 (Exhibit "SS2"), the defendants were specifically informed that the plaintiff required the money as soon as possible for that purpose. It should also be reasonably inferred that the defendants must have agreed that on the question of compensating the sub-tenants, it should be done only through the plaintiff who, after all, was the lawful tenant of the defendants.

In the event, it is inconceivable why the defendants should withhold the payment of $6,000 as agreed in July. Having failed to honour their promise, and having known the purpose of the money, it was unreasonable for the defendants to impose a new pre-condition whereby the plaintiff should first evict the sub-tenants within eight days of the letter dated August 12. In my opinion, the condition precedent imposed was not binding and unenforceable. How could the plaintiff evict the sub-tenants without the $6,000 being paid first? To my mind, nor were the defendants entitled to deduct the sum of $2,000 from the agreed sum of $6,000. By paragraph 8 of Choi Mee Chen's affidavit, it was alleged that due to plaintiff's default in negotiating a settlement with the sub-tenants they had forced the defendants to pay them a sum of $2,000 as compensation. In the first place, there was no evidence before me that any of the sub-tenants had received any money from the defendants. Even if there was such payment, the evidence merely showed that having failed to pay the plaintiff $6.000 as agreed, the defendants had entered into negotiation with the sub-tenants behind the plaintiff's back. Having done so, they then alleged that the plaintiff had failed or neglected to negotiate a settlement with the sub-tenants. Clearly this could not be a valid defence to the plaintiff's claim. It is my view that, if only the defendants had kept to their bargain and paid the plaintiff $6,000 in July or by August 12, the present dispute would not have arisen.

Under the circumstances, it was my finding that there was no serious question of law involved in this case, and that this was a suitable case to be dealt with under Order 32 Rule 6. Further, all the three sub-tenants and the plaintiff had already vacated the said premises. I accordingly allowed the judgment in terms of the Motion.

Order accordingly.

Solicitors: *Jagjit Singh & Co.; K. C. Chai & Co.*

FARIDAH BINTI MAT AKIR & ANOR. v. SHARIFAH BINTI HAJI AHMAD & ORS.

[O.C.J. (Syed Agil Barakbah J.) March 24, 1975]
[Alor Star — Civil Suit No. 51 of 1969]

Distribution — Small estates — Small Estates (Distribution) Act, 1955, ss. 10(1) and 14 — Setting aside order of collector — Jurisdiction of the court.

The parties herein appeared at a hearing for the distribution of the estate of a deceased under the Small Estates (Distribution) Act 1955 by the Collector. They agreed to the distribution being made in accordance with the Muslim law. The Collector made an order of distribution accordingly. The plaintiffs who appeared as a Committee for one of the widows, Aishah, applied for the order to be set aside on the ground that at the material time Aishah was of unsound mind.

Held: (1) the court has jurisdiction to revoke or set aside the order of a tribunal over whom the court has superior jurisdiction and control particularly so if it is based on fraud;

(2) in this case fraud was not pleaded and on the facts there was a glaring absence of fraud and therefore the application must be dismissed.

Cases referred to:-

(1) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.
(2) *Kinch* v. *Walcott* [1929] A.C. 482
(3) *Preston Banking Company* v. *William Allsup & Sons* [1895] 1 Ch. 141 at p. 143.
(4) *Gordon-Smith* v. *Peizer* 65 S.J. 607.
(5) *Birch* v. *Birch* [1902] P. 130, C.A.
(6) *Au Yuan Chee* v. *Lim Leong Thiam & Ors.* 2 M.C. 260.
(7) *Ex parte Pratt* [1884] 12 Q.B.D. 334.
(8) *Ex parte May* [1884] 12 Q.B.D. 497

CIVIL SUIT.

A. Jayadeva (*Oo Gin Sun* with him) for the plaintiffs.

R. C. Murugeson for first, fourth, fifth, sixth and seventh defendants.

Syed Agil Barakbah J.: This is a claim to set aside a distribution order made by the Collector, Pendang, in the State of Kedah, under the Small Estates (Distribution) Act, 1955.

The agreed facts are as follows:—

The land in dispute belonged to one Akil bin Lebai Mat who died on October 20, 1956. He left two widows one of whom was Aishah binti Man for whom the plaintiffs appear as Committee under Order of Court made on December 1, 1968. The second widow was Sharifah binti Haji Ahmad, the first defendant. The two plaintiffs, the second, third, fourth, seventh and eighth defendants are the natural children of the deceased Akil, the sixth defendant a daughter-in-law and the rest of the defendants are the lawful beneficiaries to his estates. Upon his death a distribution suit was applied by the third defendant. During the hearing before the Collector, Pendang, the applicant and all the other beneficiaries, including the first widow Aishah, were present. According to record (pages 1 to 4 of Agreed Bundle, Exhibit "B") all present agreed to the distribution being made in accordance with the Muslim law. An order was accordingly made by the Collector under section 13 of the Act. (See pages 8 and 9 of Agreed Bundle, Exhibit "A"). Aishah was entitled to 448/2048 shares as a widow and so was the second widow, Itam. It

is this distribution order that the plaintiffs seek to set aside on the sole ground that Aishah at the material time was of unsound mind and therefore did not know the nature of the proceedings for distribution before the Collector, Pendang. They also seek a declaratory order that Aishah is entitled to the extent of half share of the land comprising the estate on the ground it was acquired by the joint earnings of herself and her deceased husband during their lifetime. An objection on a point of law raised at paragraph 6 of the Statement of Defence states that the court has no jurisdiction to entertain the plaintiffs' claim to set aside the distribution order and/or the Statement of Claim discloses no cause of action against the defendants.

It was submitted by Mr. Murugeson for the first, fourth, fifth, sixth and seventh defendants that the jurisdiction of the High Court under the Act in relation to the distribution of small estates is not original since section 4 provides exclusive jurisdiction to the Collector to deal with the distribution and administration of the whole estate and any interest therein shall devolve on or vest in any person under an order or grant made by the Collector. Except for the original jurisdiction to grant probate of testamentary disposition relating to a small estate under section 5, to reseal a grant of representation outside Malaysia affecting a small estate under section 6, and the power to transfer petitions relating to an intestate small estate to the Collector under section 7, the jurisdiction of the High Court is as follows:—

(1) to determine any collateral disputes under section 14 regarding immovable property where the beneficial right of interest is in dispute between two or more claimants in which the parties are directed to institute proceedings by the Collector in the court;

(2) to give opinions and directions on any difficult point of law referred to by the Collector under section 19; and

(3) to hear and determine any appeal against any order, decision or act made or done by the Collector at the instance of the aggrieved party; the decision of the High Court is final and not subjected to any further appeal as provided by section 29.

Mr. Murugeson urged that by virtue of section 17 the Collector in the circumstances has power to revoke or set aside the order of distribution made by him. Therefore the application to set aside the present order ought to have been submitted to the Collector under this section and regulation 12 of the Small Estates (Distribution) Regulations, 1955. With respect I do not agree. Though section 17 speaks of subsequent applications, sub-section (1) empowers the Collector to appoint a new trustee or a new administrator or make any other or further order or withdraw a caveat. Sub-section (3) provides the discretionary power either on his own motion or on application of an interested party to revoke any grant of administration made by him or to order any administrator to file accounts etc., concerning the administration of the estate. Clearly, that section does not empower him to revoke or set aside any order of distribution made by him. An order of distribution is not the same as a grant of administration.

On the other hand, Mr. Jayadeva for the plaintiffs submitted that this suit is brought not by way of appeal but to set aside an order on grounds of fraud. No appeal could be filed since the period of appeal had already lapsed when the mental condition of Aishah was discovered and the only way was by a civil action. He further urged that under section 23 of the Courts of Judicature Act, 1964, the High Court has wide jurisdiction to try all civil proceedings as stated therein.

At this stage I pause to consider in passing whether this action ought to have been brought by way of appeal. On this issue there is authority that a judgment by consent (in this case an order by consent) cannot be set aside on motion after it has been passed and entered. A fresh action must be brought for the purpose. (See *Ainsworth* v. *Wilding*[1] as approved in *Kinch* v. *Walcott*).[2]

Now, it is an accepted principle that the court has no jurisdiction to rehear or alter an order which it has made after it has been passed and entered provided that it accurately expresses the intention of the court. However, if the order has been drawn up but on ground of mistake or otherwise it does not express the intention of the court, then it has jurisdiction to correct it. (*Per* Lord Halsbury in *Preston Banking Company* v. *William Allsup & Sons*).[3] In the same case A.L. Smith L.J. said at page 145:—

> "... so long as the order has not been perfected, the judge has a power of reviewing the matter, but when once the order has been completed the jurisdiction of the judge over it has come to an end."

(See also Order 28 rule 11 of Rules of Supreme Court regarding the power of the court to amend judgments due to clerical mistakes and accidental omissions). In another case it was held that the court has power to set aside a fraudulent judgment in a second action brought for the purpose of setting aside a judgment obtained by fraud in the first action. (See *Gordon-Smith* v. *Peizer*[4] — *Annual Practice* 1958, page 612). It can only be set aside, in most cases, as only against the person who permitted or procured the fraud. (See *Birch* v. *Birch*).[5] In order to enable the court to set aside the order it must be established that an order has been obtained fraudulently or by reason of a mutual mistake of the parties regarding a material fact. (See *Au Yuan Chee* v. *Lim Leong Thiam & Ors.*).[6] In that case Pretheroe J. set aside the consent order made previously in the High Court in Ipoh on the ground that the court was misled in the former suit and "the plaintiff's agreement with the new defendants' claim in that case was obtained by fraud."

In the present case, the question is whether this court has jurisdiction to revoke or set aside the order of a tribunal over whom the court has superior jurisdiction and control under the Act as explained earlier. In my considered judgment the court has such jurisdiction, particularly so if it is based on fraud.

Be that as it may, in the present action fraud although submitted by the plaintiffs' counsel, has not been specifically pleaded. Reading the Statement of Claim the defendants are left in an uncertain position as to whether the ground to set aside is actually fraud, misrepresentation or mutual mistake. It is an accept-

ed rule of pleading that fraud must be specifically pleaded so as not to catch the other party by surprise and enable them to put up a proper defence. It may be that Aishah's insanity if proved to be so during the distribution proceedings before the Collector is material to the question of distribution. Had that been made known to the Collector by the plaintiffs who were also present with Aishah there was nothing to stop him from appointing some proper and suitable person as guardian for the purpose of the proceedings by virtue of section 10(1) of the Small Estates(Distribution) Act. The manner of distribution under the Muslim law would still be the same. The pleadings clearly show the plaintiffs should well be aware of Aishah's condition for according to them she had been insane for the last thirty years. Both are her natural daughters. Yet neither of them informed the Collector. It was only about five months or so later that Aishah was admitted to the General Hospital, Penang, for observation and declared to suffer from pre-senile dementia and incapable of managing her own affairs. The same position applies to the claim that she is entitled to half portion as syarikat share of the deceased's estate. That the plaintiffs must have been aware of it, if the allegation is true, when they were before the Collector, is an irresistible conclusion deducible from the pleadings and the Agreed Bundles of Documents. Had they informed the Collector the matter could be referred to the court as a collateral dispute under section 14 of the Act. They had that knowledge yet refrained from doing so. There is authority for the proposition that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who has invited or allowed the court (in the present case the Collector) to exercise it in the wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. (See *Ex parte Pratt*[7] and *Ex parte May*).[8] To my mind, there is a glaring absence of any ground for fraud and in the circumstances there seems to be no cause of action.

I have no alternative but to dismiss the claim with costs.

Claim dismissed.

Solicitors: *Oo Gin Sun & Co.; R. C. Murugeson.*

YEAP LEONG HIN & ORS. v. LEE CHENG KIN & ANOR.

[O.C.J. (Arulanandom J.) March 28, 1975]
[Penang — Originating Summons No. 366 of 1974]

Practice and Procedure — Trust — Beneficiaries to the action — Adopted children — R.S.C. 1957, O.55 rr.3(1)(e) and 14A.

This was an application by the beneficiaries of an estate for certain orders relating to the estate.

The defendants, the executors and trustees took a preliminary objection to the application in that all beneficiaries had not been included in the action.

Held: the three beneficiaries who were not parties were fully aware of the proceedings and had no interest in the trust. In the circumstances there was no necessity for them to be represented by the trustee or any one else.

Obiter: Adopted children can only be entitled if legally adopted under the Adoption Ordinance by the testator.

ORIGINATING SUMMONS.

Lim Ewe Hock for the first and second plaintiffs.

Gan Teik Chee for plaintiffs Nos. three to ten.

Philip Hoalim Jr. and *I. K. Meek* for the defendants.

Arulanandom J.: This is an application by ten beneficiaries of the Will of Yap Kim Hoe (deceased) dated September 8, 1959 against the defendants, the executors and trustees of the Will, for the following orders under Order 55 rule 3(1)(e) and Order 55 rule 14A of the Rules of the Supreme Court 1957 namely:—

1. An order that the right to transfer the stock and shares specified in the First Schedule hereto or such stock and shares as are now held under the said Will Trust do vest in the first eight (8) plaintiffs abovenamed or their nominees and that the Secretary of the respective companies in which the said stock and shares are held be empowered to execute transfers of the said stock and shares to the said plaintiffs or their nominees, the defendants having neglected to transfer the same to the order of the plaintiffs for more than 28 days after the request on behalf of the plaintiffs so to do;
2. That (subject to such provision for payment of the allowances under clause 8 of the said Will as the court may deem fit), the defendants do forthwith surrender, assign or transfer the land specified in the Second Schedule hereto and the right to recover the debt specified in the Third Schedule hereto and deliver up all cash, chattels and assets whatsoever held by the defendants under the said Will Trust to the first eight (8) plaintiffs abovenamed or their nominees;
3. That the defendants do forthwith surrender and deliver up all documents of title, share certificates, accounts, records and paper writing whatsoever belonging to or pertaining to the said trust to the plaintiffs or their nominees;
4. Further or other reliefs;
5. That the defendants do personally pay the costs of, and incidental to, this application.

The defendants entered appearance and filed an affidavit resisting the application on the grounds that